

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

NO. 20788

FRANCES T. HONG,)
)
Appellant,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)
_____)

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

REPLY BRIEF FOR APPELLANT

FILED

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SUBJECT INDEX

	<u>Page</u>
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
A	2
B	6
C	9
D	10
APPENDIX	12
CERTIFICATE	14

CITATIONS

	<u>Page</u>
Cases:	
<u>Gould v. Gould</u> , 245 U. S. 151, 38 S. Ct. 53 (1917)	10
<u>Tandy Leather Company v. U. S.</u> , 347 F.2d 693 (5th Cir., 1965 reversing DC), 16 AFTR 2d 6223	10
Statutes:	
Internal Revenue Code of 1954:	
Sec. 4151 (26 U.S.C. 1958 ed., Sec. 4151)	1, 2, 3, 4, 5
Miscellaneous:	
Funk & Wagnalls, <u>New Standard Dictionary of the</u> <u>English Language</u> (1931), 1043	5
Roberts, <u>Ancient Hawaiian Music</u> (1926)	8
Rev. Rul. 62-44, 1962-1 Cum. Bull. 209	6, 7, 8
Rev. Rul. 63-237, 163-2 Cum. Bull. 509	6, 7
Treasury Regulations on Manufacturers and Retailers Excise Tax:	
Sec. 40.4151-1 (26 C.F.R., Sec. 40.4151-1)...	10
Treasury Regulations on Statement of Procedural Rules:	
Sec. 601.201(a)(5)	10
Internal Revenue Bulletin (1)	10

SUMMARY OF THE ARGUMENT

The District Court erroneously held that uli-ulis are musical instruments within the meaning of Section 4151 of the 1954 Code, the pertinent Regulations and Revenue Rulings.

A. The finding of the District Court is not supported by the evidence and is clearly erroneous.

(1) The function of the trier of fact is to apply the proper criteria in determining whether an article is taxable as a musical instrument.

(2) Uli-ulis are not similar to castanets and maracas in that the uli-ulis are not used in the rendition of musical compositions, but are used exclusively by hula dancers.

(3) The fact that studies and students of, and experts on, ancient Hawaiian music consider the uli-uli a musical instrument is irrelevant to the determination as to whether it is such for purposes of taxation.

(4) The listing of the uli-uli as a musical instrument in a dictionary and glossary considered to be authoritative by the trier of fact is irrelevant to the determination of whether it is taxable under sec. 4151 of the I.R.C.

B. The District Court applied the wrong standard to the facts. The trier of fact should have applied the following criteria in determining whether the uli-uli is a musical instrument for the purpose of taxation:

(1) the primary purpose for which the article is designed;

(2) the quality of construction of the article;

(3) whether it is a type ordinarily used in the rendition of musical compositions;

(4) whether it is adaptable for teaching proficiency in the use of musical instruments.

C. The District Court erroneously admitted evidence of the historical background of the instrument.

D. The Appellee is bound by its own Revenue Rulings.

E. Statutes providing for taxation are to be construed strictly as against the taxing power in favor of the taxpayers.

ARGUMENT

The District Court erroneously held that uli-ulis are musical instruments within the meaning of Section 4151 of the 1954 Code, the pertinent Regulations and Revenue Rulings.

A. The finding of the District Court is not supported by the evidence and is clearly erroneous. Appellant, in her opening brief, has pointed out that certain findings of fact were not supported by the evidence ("Arguments", p. 4). These findings were numbered 11 to 16 (I-R. 26), the first ten findings having been stipulated. Appellee's arguments may be summarized as follows: (1) It is the function of the trier of fact to make the determination as to whether an article is a musical instrument, especially when the case is heard in the locale associated with the instrument concerned; (2) uli-ulis are comparable to castanets and maracas; (3) studies of ancient Hawaiian music indicated, and students and experts considered the uli-uli to be a musical instrument; (4) and a German dictionary lists the uli-uli as a musical instrument.

(1) The function of the trier of fact, in determining whether an

article is a musical instrument, for the purposes of sec. 4151 of the I.R.C. 1954, is to apply certain standards set forth in the treasury regulations and as explained in the revenue rulings. His function is not to determine whether the article was once a musical instrument even though no longer used as such (II-R. 143, 144), or even whether it is a musical instrument today for any purpose other than that for excise taxation.

(2) Uli-ulis are similar to castanets in the sense that both are used by dancers. They differ in that castanets are ordinarily used in the rendition of musical compositions (II-R. 25, 36, 53). There are hundreds of scores or musical compositions in which castanets, claves and maracas are included (II-R. 25). On the other hand, only one of the nine witnesses testifying actually heard of the uli-uli being used in an orchestral arrangement or on a commercially-sold phonograph record (II-R. 70). All of appellant's witnesses testified that they had never seen or heard of an uli-uli performed by a musician (II-R. 13, 16, 17, 24, 36, 40, 43, 44, 52). One of appellee's witnesses was not familiar with any musical composition or score for the uli-uli (II-R. 108). Another knew of the existence of but one song scored for the uli-uli in the entire world. Another heard of one other, besides some ancient ones, but had never heard it played (II-R. 132, 133). Other differences between uli-ulis and maracas have been pointed out in Appellant's brief (p. 9, 10), the basic difference being that the maracas is not used by a dancer, while the uli-uli is used exclusively by a dancer. The Court should take judicial notice of the difference in balance when the uli-uli is attempted to be played in the same position as the maraca. The feather on the uli-uli causes a different distribution of weight and renders the

uli-uli a bulkier instrument to handle. If the maraca is so similar to the uli-uli, there would have been an interchange in the use of the instruments and one who becomes proficient in the use of one would also become proficient in the use of the other. However, it does not require any musical talent to dance the hula with the uli-uli, but a maracas player must be able to read and follow musical scores. If the maraca is considered similar to the uli-uli, a pair of wooden chopsticks or broomsticks must be deemed similar to the claves. All can be beaten rhythmically; all are wooden sticks. What, then, makes the claves a musical instrument? The simple fact that it is a standard musical instrument used in the ordinary rendition of musical compositions and for which there are many scores written (II-R. 25, 26, 53). Query, whether a swishing grass skirt which rhythmically accompanies the hula is a musical instrument under the tests used by the appellee. Or the toe plate attached to the shoe of a tap dancer.

(3) Studies of ancient Hawaiian music and students and experts considered the uli-uli a musical instrument. Even if all the witnesses were in accord in finding that the uli-uli is a musical instrument for historical and academic purposes, the primary issue in this case has not been answered. The witnesses were not qualified to render an opinion that the uli-uli is a musical instrument for the purposes of taxation under Sec. 4151 of the I.R.C. of 1954. Indeed, the admission of the studies referred to were objected to and should have been rejected as evidence, since they related to ancient Hawaii (II-R. 81, 87).

(4) The German dictionary referred to, which is also a

"poly-glossary,"¹ a multi-purpose glossary for the entire field of musical instruments" (II-R. 105), lists the uli-uli as a "vessel-type rattle out of a calabash filled with pebbles which rhythmically accompany songs". The uli-ulis manufactured and sold by the appellant are filled with seeds and are used by a hula dancer in her dance. Query, whether the uli-ulis listed in the dictionary are of the same type (there were a number of different types in existence; see (II-R. 87-90, 95) or whether the listing is accurate. Even if the dictionary is an "authoritative work", and the listing correctly refers to the type of uli-uli sold by the appellant, mere listing therein does not ipso facto render such uli-uli subject to taxation under sec. 4151, or even be accorded much weight as a factor when other criteria have been enumerated in the pertinent revenue rulings.

Appellee summarizes its own arguments, beginning with page 16 of its brief, but since the summary seems to be restatements of the findings of fact, which appellant has already discussed in her opening brief (pp. 4 - 1), appellant merely emphasizes at this point that the summary as well as the findings of fact were unsubstantiated by the evidence, to the extent indicated in appellant's opening brief. It should be pointed out, however, the chief testimony that the uli-ulis are occasionally used by chanters was by

¹"Glossary" is defined as: "1. A lexicon of the obsolete, peculiar, obscure, or foreign words of a work or an author; an explanatory vocabulary dealing with a class of words, as those of a dialect or science. 2. A compilation of glosses or marginal notes." Funk & Wagnalls, New Standard Dictionary of the English Language (1931), 1043.

"Gloss" is defined as: "1. A note or comment, especially a marginal or interlinear note or a foot-note explanatory of something obscure, obsolete, or foreign in the text. 2. A superficial and plausible but misleading explanation, frequently intended to conceal a fault or defect." Ibid.

a student of anthropology who was not a witness on the use of uli-ulis during the taxable period in question (II-R. 92).

B. The District Court applied the wrong standard to the facts. Even if the findings of the District Court were substantiated by the evidence (which appellant does not concede), nevertheless the Court has failed to apply the proper standard to the facts. Appellee contends that because of the "broad character of the statutory term 'musical instruments'", it is the peculiar function of the trier of fact to determine whether an instrument is taxable. Especially so where the District Court heard the case in the locale of the instrument concerned. This may all be true in the absence of the following pertinent Revenue Rulings: Rev. Rul. 62-44, 1962-1 Cum. Bull. 209; and Rev. Rul. 63-237. These rulings set forth four factors: (1) the primary purpose for which the article is designed; (2) the quality of construction of the article; (3) whether it is a type ordinarily used in the rendition of music compositions, either in solo presentation or in connection with other music instruments; (4) or whether it is adaptable for teaching proficiency in the use of musical instruments. There is not involved here the question of whether the uli-uli is used primarily by dancers or primarily by musicians. There is here no dual use such as is true of the castanets or the pipes (see comment on pipes by the District Court (II-R. 142)). Appellant agrees that if the uli-uli were a musical instrument as defined by the revenue rulings, it would not be any less so because it is also used by hula dancers.

(1) Primary purpose for which the uli-uli is designed. The incontrovertible evidence shows that the uli-uli is designed for the sole purpose

(2) Quality of construction of the article. This factor probably has reference to the quality of an article which is supposed to be a toy version of the genuine article as compared to the quality of the genuine article. See Rev. Rul. 63-237 (drums and tambourines) and 62-44 (wind instrument and percussion instrument). Appellee makes a point that the tourist version of the uli-uli has not been taxed, since it falls within the "toy or novelty" exception of the Regulations, and that the genuine article should be taxed. Appellant contends, however, that the "genuine" article is not a musical instrument to begin with.

(3) Whether the uli-uli is ordinarily used in the rendition of musical compositions. Again the evidence is uncontradicted that the uli-uli is almost never used in the rendition of musical compositions. It cannot be said that it is even occasionally, let alone ordinarily, so used. The uncontradicted evidence shows that only once was the uli-uli used in the rendition of a musical composition (II-R. 68), and it was by a musician who strived for "far-out and weird sounds" (II-R. 73). None of appellant's witnesses had ever heard of compositions or scores for the uli-uli, let alone seen a performance of one by a person who was not doing a hula (II-R. 13, 16, 17, 34, 36, 40, 43, 44). Of appellee's witnesses, Mrs. Gillett was not familiar with any composition for the uli-uli (II-R. 108). Mrs. Mahoe knew of the existence of but one song scored for the uli-uli (II-R. 124). Mrs. Richards knew of one other, but had never heard it played (II-R. 132, 133). Mrs. Williamson, who was not "offered as a witness on the subject of who uses uli-ulis today or 1955 to 1960" (II-R. 92), testified that pages 237 to 260

of a book by Helen Roberts, entitled Ancient Hawaiian Music, contained scores for uli-ulis. These scores were not, however, limited to the type of uli-uli in question, but included types which are in the Bishop Museum collection as well as some which are not in the collection (II-R. 87 - 90, 95). There is no testimony by Mrs. Williamson that she has heard any of these scores performed and Mrs. Richards testified that she had never heard any of them performed (II-R. 132, 133).

(4) Whether it is adaptable for teaching proficiency in the use of musical instruments. There is absolutely no evidence that the uli-uli is adaptable for teaching proficiency in the use of musical instruments. The "evidence" which comes closest (but not very close) is embodied in a conclusion drawn out of appellee's witness by appellee's counsel:

Q Is this instrument suitable for instructing in music?

A It is essential if you are thinking of Hawaiian music. (II-R. 106)

No evidence was adduced as to how the uli-uli can be used in the instruction of music, either in theory or practice. Cf. Rev. Rul. 62-44, wherein the test used is whether the article "is adaptable for teaching proficiency in the use of musical instruments", 1962-1 Cum. Bull. 209, and not the abstract test of "instructing in music". It also appears that the term "musical instruments" has reference to "standard instruments"; see, e.g., Rev. Rul. 62-44: The last sentence in the paragraph following the description of "(2) percussion instrument" states: "Few musical compositions arranged for standard instruments can be played on these articles." (Underline added.)

The very nature of the findings of fact, both oral and formal, indicate that the District Court had not applied the factors set forth in the revenue

ulings. A further indication can be found in the apparent reluctance of the District Court to overrule appellee's counsel's objection to the following question asked by appellant's counsel:

Q With reference to the time that you have been acquainted with music, have uli-ulis been ordinarily used in the renditions of musical compositions? (II-R. 51).

MR. FINK: Objection, your Honor. I objected to this question when put to another witness. That is not before us here. It has no relevance whether they are ordinarily used in playing musical compositions.

THE COURT: Well, it may be a leading-up question to some of the others. They have gone just about as far on the other question, Mr. Fink. You can argue that.

After the question was read back, the following transpired:

THE COURT: Just a minute. Could you say "ever" rather than "ordinarily", or to his knowledge?

MR. CHUNG: Well, your Honor, in argument we do intend to argue that one of the tests is "ordinarily". I will ask the next question.

THE COURT: All right. I will allow it subject to--well, you can argue that later, Mr. Fink. (II-R. 51, 52).

C. The District Court erroneously admitted evidence of the historical background of the instrument. This evidence was incorporated in finding of fact numbered 12 (I-R. 26). Historical background may be proper to ascertain whether an article is a musical instrument during the time when it was in use, and may be a factor to be considered in classifying the article for broad academic purposes. It certainly has no place where the issue narrows down to whether it is a musical instrument for the specific purpose of taxation, as the law and regulations are interpreted by the revenue ruling

D. The Appellee is bound by its own Revenue Rulings. The appellee should be bound by its own interpretation of the law and regulations. Treasury Regulations sec. 601.201(a)(5) states as follows:

A "Revenue Ruling" is an official interpretation by the Service which has been published in the Internal Revenue Bulletin. Revenue Rulings are issued only by the National Office and are published for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned.

In the "Introduction" to each volume of the Internal Revenue Bulletin appears the following statement:

Revenue Rulings and Revenue Procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury Decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. (See, e.g., 1962-1 C.B. (1).)

The revenue rulings cited hereinabove should be considered as having substantial force and effect since they are essential to the proper construction of Regulations Sec. 40.4151-1.

E. The general rule is that the statutes providing for taxation are to be construed strictly as against the taxing power in favor of the taxpayers. Gould v. Gould, 245 U. S. 151, 38 S.Ct 53 (1917); followed in Tandy Leather Company v. U. S., 347 F.2d 693 (5th Cir., 1965 reversing DC), 16 AFTR 2d 6223 (retailers excise tax not imposed on sale of leathercraft kits). The Tandy Leather case, at 695, cited 51 American Jurisprudence, "Taxation", Sec. 316, "Strict or Liberal Construction", as follows:

*** The correct rule appears to be that where the intent or meaning of tax statutes, or statutes levying taxes, is doubtful, they are, unless a contrary legislative

intention appears, to be construed most strongly against
the government and in favor of the taxpayer or citizen. 1
[Citing a number of cases.] Any doubts as to their meaning
are to be resolved against the taxing authority and in favor
of the taxpayer.

Respectfully submitted,

Dick Yin Wong

Dick Yin Wong

A wind instrument consists of a plastic tube approximately 11 inches long. It has a removable plastic mouthpiece and has seven finger holes on one side and a thumb rest and finger hole on the other. Two musical scales may be played on it.

A percussion instrument consists of twelve metal tubes of the same diameter mounted in a frame. The tubes differ in length, graduating from approximately five inches to nine inches. The notes which they produce range from "middle C" to "G" above "high C." It is played by striking the tubes with a wooden mallet.

Field, because of the limitations on the use of the articles, they are not generally suitable for the rendition of musical compositions or adaptable for teaching music and are not subject to the manufacturers excise tax on musical instruments imposed by section 4151 of the Internal Revenue Code of 1954.

Advice has been requested concerning the applicability of the manufacturers excise tax on musical instruments, imposed by section 4151 of the Internal Revenue Code of 1954, to sales by the manufacturer of the articles described below.

(1) *A wind instrument.*—This article consists of a plastic tube approximately 11 inches long and a removable plastic mouthpiece. It has seven finger holes on one side of the tube and a thumb rest and a finger hole on the other side. Two complete musical scales may be played on the article by manipulating the fingers over these holes and blowing into the mouthpiece.

(2) *A percussion instrument.*—This article consists of 12 metal tubes of the same diameter mounted in a frame. The metal tubes are graduated in length from approximately five inches for the smallest to nine inches for the longest. The notes which they produce range from "middle C" to "G" above "high C." The article is played by striking the metal tubes with a wooden mallet.

The instruments are designed, advertised, and sold for use as tools to test musical potential and to develop and encourage interest in music for the purpose of preparing a student for the playing of a musical instrument. The selections that may be played on both the wind instrument and the percussion instrument by reason of the limitations in design and other characteristics of the devices are limited. Few musical compositions arranged for standard instruments can be played on these articles.

Section 4151 of the Code imposes a tax upon the sale of musical instruments by the manufacturer, producer, or importer thereof.

Under the provisions of section 48.4151-1(d) of the Manufacturers and Retailers Excise Tax Regulations, the term "musical instruments" includes all wind, reed, string, percussion or electronic instruments used to produce music, including but not limited to all types of pianos and organs, trombones, saxophones, violins, drums, xylophones, chimes, etc. The term does not include articles in the nature of toys or novelties which simulate musical instruments and which are unsuitable for use in playing musical compositions or in teaching music.

In determining whether a particular article is a musical instrument, consideration is given to a variety of factors. Among them are the primary purposes for which the article is designed; the quality of construction of the article; whether it is a type ordinarily used in the rendition of musical compositions, either in solo presentation or in connection with other musical instruments, or whether it is adaptable for teaching proficiency in the use of musical instruments. In considering the last two factors it is not essential that the article used in musical rendition or instruction be of a professional standard or quality. The aforementioned factors are not all inclusive, and no one of them is determinative of the taxability of a particular article.

The instruments here under consideration are widely used to test the musical potential of children and to encourage the instruction of music; they are of a design and quality comparable to toys or novelties which simulate musical instruments, and their relationship to the actual teaching of music is limited to determining whether children have sufficient natural musical ability to warrant the additional instruction required to teach them proficiency in the use of a standard musical instrument. Thus, these instruments are not "musical instruments" as defined in section 48.4151-1(d) of the regulations.

Drums and tambourines which are suitable for use in playing musical compositions or for use in teaching music are musical instruments within the meaning of section 4151 of the Internal Revenue Code of 1954, even though they are referred to as "toys" by the manufacturer.

Advice has been requested concerning the applicability of the manufacturers excise tax on musical instruments to sales by the manufacturer of the articles described below.

A company manufactures and sells certain "junior" drums and tambourines. The drums are constructed with shells of one-eighth-inch thick, factory-second, unseasoned wood. Some of the shells have a plastic covering; others are merely stained and given one coat of lacquer. The drum heads are made of split water-buffalo hide. The metal parts of these drums are plated with an inexpensive nickel plating. They are equipped with a single tensioning device and counter hoops. The tambourines are of two-piece plywood rim construction with heads of split water-buffalo hide and jingles of thin steel.

The company refers to these drums and tambourines as "toys" in its advertising circulars and price lists. Moreover, they are displayed as toys at toy fairs. However, the company sells these articles through the same merchandising channels as it does its higher quality musical instruments. The company contends that these drums and tambourines are designed for use as toys.

Section 4151 of the Internal Revenue Code of 1954 imposes a tax upon the sale of musical instruments by the manufacturer, producer, or importer thereof.

Section 48.4151-1(d) of the Manufacturers and Retailers Excise Tax Regulations provides that the term "musical instruments" includes all wind, reed, string, percussion or electronic instruments used to produce music, including but not limited to all types of pianos and organs, trombones, saxophones, violins, drums, xylophones, chimes, cymbals, bongos, castanets, maracas, claves, etc. The term does not include articles in the nature of toys or novelties which simulate musical instruments and which are unsuitable for use in playing musical compositions or in teaching music.


In determining whether a particular article is a musical instrument, consideration is given to a variety of factors. Among them are the primary purpose for which the article is designed; the quality of construction of the article; whether it is a type ordinarily used in the rendition of musical compositions, either in solo presentation or in connection with other musical instruments; or whether it is adaptable for teaching proficiency in the use of musical instruments. In considering the last two factors, it is not essential that the article used in musical rendition or instruction be of a professional standard or quality. The aforementioned factors are not all inclusive, and no one of them is determinative of the taxability of a particular article. See Revenue Ruling 62-44, C.B. 1962-1,209.

The drums and tambourines described above are constructed of material of a better and more durable quality than is generally found in toys. The heads of the drums and tambourines are made of a material which produces the desired sound for musical compositions. The jingles on the tambourines conform favorably to the tone quality generally found in higher quality tambourines. Therefore, these drums and tambourines are not considered to be in the nature of "toys or novelties which simulate musical instruments" within the scope of the regulations, but articles which are suitable for use in playing musical compositions or for use in teaching music.

In view of the foregoing, it is held that these drums and tambourines are musical instruments within the meaning of section 4151 of the Code. Accordingly, sales by the manufacturer thereof are subject to the manufacturers excise tax on musical instruments, imposed by that section.

CERTIFICATE

I certify that, in connection with the preparation of this brief, have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Dick Yin Wong



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**LUMBERMENS MUTUAL CASUALTY
COMPANY**, an Illinois Corporation, and
**WALDORF-HOERNER PAPER PRODUCTS
COMPANY**, a Montana Corporation,
Plaintiffs and Appellants

— vs. —

BABCOCK & WILCOX COMPANY, a New
Jersey Corporation, and **CLARAGE FAN
COMPANY**, a Michigan Corporation,
Defendants and Appellees

Appeal from the United States District Court
for the District of Montana, Missoula Division

REPLY BRIEF OF APPELLANTS

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Waldorf-Hoerner Paper Products Company

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The net substance of respondents' brief convinces the reader that their whole position finally depends upon avoiding the significance of Adamek's testimony that the fan failure issue was not discussed and settled, from which they reason that since the fan failure issue was not *excluded* from the correspondence in explicit words, it therefore must have been *included*.

Running through all the pages of argument to this general effect are charges of what amount almost to professional impropriety and over-reaching on our part, so as to minimize the forces supporting our contentions. Thus, there are references to our tricks of advocacy (p. 10), our effort to emasculate Rule 52(a) (p. 10), secret reservations suggested to Sandberg (p. 24), Adamek being misled by a trap question (p. 26), deliberate distortion of meaning (p. 28), careful ignoring of evidence (p. 29), strange coyness about the insurance payments (p. 37), etc.

It would be most unfortunate if such characterizations were somehow to divert significant testimony from full and fair evaluation, and while in this court it doubtless would not happen, yet we feel some reply is due.

First, let us regain perspective. The question is whether a clearly intended settlement of

certain specific issues also was an unarticulated settlement of another and different issue.

For the purpose of illustration, let us for the moment *assume* that Adamek's testimony as quoted on p. 18 of our original brief is true, and that Adamek and Sandberg did *not* undertake to discuss and negotiate out the fan failure liabilities. If we assume this as truth, and test the ensuing correspondence and conduct of the parties accordingly, does it not appear that they are exactly what one would expect? If the subject was not discussed and settled, isn't it perfectly normal that neither one would explicitly *exclude* it from his closing record? Who routinely negatives things that are not involved? And would not each leave to the other his own intra-company breakdown of the closing on whatever basis he might wish, and not challenge it further? And is it not also consistent with this that neither Clarage, nor Babcock & Wilcox counsel, nor anyone else, were informed that warranty and product failure claims by Waldorf had been affirmatively paid and discharged on an undefined basis of which no record is to be kept? We think all these are very persuasive that in *fact* he testified to the truth.

Now, let us examine more closely the charge that Adamek was misled by a trap question. Could he somehow have been mistaken in what he said?

His deposition was taken in his office in Minneapolis by stipulation, with trial counsel for both parties participating. In advance, he had discussed the case with counsel, and had read Sandberg's deposition (p. 7, l. 15-21). Adamek is a Sales Engineer for Babcock & Wilcox, with twenty-four years of service to that Company at the time of the deposition. How does a lawyer go about trying to mislead a college-educated, experienced, fully familiarized witness in his own field, accompanied by his own counsel? We may think we are good lawyers, and we try to be, but we aren't that good!

Furthermore, we did not try to mislead him, and the record shows this. Thus:

“Q. From all of these matters you know in general that the purpose of our taking this deposition now is to establish your knowledge as to the truth and correct interpretation of the letters passing between your company and Waldorf dated September 7, 1962 and September 10, 1962 and another one September 11, 1962?

A. Yes.”

(P. 7, l. 22—p. 8, l. 3, Adamek depo.)

Then followed many pages of interrogation on various phases of the case, after which came the “trap” question—and what is in the nature of a trap we do not perceive.

“Q. Let me ask you whether in the course of this meeting there in August of 1962 you and the service department and Mr. Sandberg undertook to discuss and negotiate out any liability of either your company or the Clarage Fan Company on the warranty for the induced draft fan or responsibility for the failure of the fan?

A. Not that I recall.

Q. And this would not have been a province of the service department, I take it?

A. I don't believe it would be.

Q. And really it would not be a part of the function of your department, the sales department?

A. That's true.”

(P. 35, 15-17, Adamek depo.)

His answers seemed clear and to the point, so the subject was not further pursued.

Then came cross examination by his company's own counsel, with whom he had conferred that morning.

“Q. Did you ever see those figures until this letter arrived?

A. I never saw them until this letter.

Q. Then did you notice the language in the letter, 'You have refused to consider

any allowance for Waldorf labor, supervision, travel expense of the writer and Waldorf St. Paul engineering staff, Westinghouse and Clarage Fan Company serviceman's labor and material to restore the two No. 2 ID fan and drive, after two complete failures (the first one occurred within the one year warranty period)'. Were you aware of that being in his letter?

A. Yes.

Q. Now, does that recall anything to you with respect to the conversation between Mourer and Sandberg as to whether or not they had discussed the responsibility for the fan failures at your meeting?

A. I can't recall any specific statements or anything, but the responsibility for the fan failure, since it happened within the one year period and we have a one year warranty on material, is definitely Babcock & Wilcox's responsibility to replace it.

Q. Yes, *but was there a discussion about this?*

A. *I can't recall.*"
(P. 44, 1. 10—P. 45, 1. 7, Adamek depo.)

Here was the same answer, "I can't recall," to the question of whether responsibility for the fan failures was *discussed*, much less whether the responsibility was *compromised and settled*. On p.

42, he had already testified that he knew of the failures, but “no money or charges or anything involved.” Parenthetically, let us ask how one decides to settle major claims, when he does not have knowledge of “money or charges or anything involved.”

Certainly he was not being misled or trapped by his own counsel, and yet his answers were to the same effect as to us. Thus it is that we feel they ring absolutely true, and are the key to this case. When Adamek read over his words, signed the deposition, swore to its truth, and did not come to the trial to testify to any different view, we contend that the position he stated shows forth clear and true, with nothing either distorted or ignored. Therefore, when both principals swear they did not discuss and settle the fan failure liabilities, there is nothing to support the Court’s finding that the parties used language “appropriate to effectuate” the intention to settle them notwithstanding. (Finding VIII).

There are other replies to other points made by respondents, but in the interest of brevity we will respond to them at the time of oral argument.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

